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IN THE

Supreme Court of the United States

The City of Cincinnati, a Municipal Corporation,
Petitioner,
vs.
Margaret W. Vester,
Respondent.
No. 372.

The City of Cincinnati, a Municipal Corporation,
Petitioner,
vs.
James S. Richards and Paschal L. Richards,
Respondents.
No. 373.

The City of Cincinnati, a Municipal Corporation,
Petitioner,
vs.
Llewellyn B. Reakirt,
Respondent.
No. 374.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

GILBERT BETTMAN,
Attorney General.

L. F. LAYLIN,
Of Counsel.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The undersigned, as attorney general of the state of Ohio, respectfully moves this Honorable Court for leave to file on behalf of the state of Ohio the accompanying brief in these cases as amicus curiae.

GILBERT BETTMAN,
Attorney General of the State of Ohio.

L. F. LAYLIN,
Of Counsel.

BRIEF OF GILBERT BETTMAN, ATTORNEY GENERAL OF OHIO, AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

In the present cases the validity of Section 10 of Article XVIII of the Constitution of Ohio is directly attacked. While it is true that both of the lower courts were careful to deny that this constitutional provision is wholly without effective force, it is idle to argue that, if the decision of the courts below be permitted to stand, the right of excess condemnation, which the people of Ohio have attempted to vest in their municipal governments is not practically denied. Wherever the people of a sovereign state in the most solemn way available to them have expressed their will, and that will is the subject of attack as violative of private rights guaranteed by the Constitution of the United States, it becomes not only the right, but also the duty, of the chief law officer of the state to appear.

THE FACTS.

It would be work of supererogation to review the facts in the three cases here under consideration. The details are fully and exhaustively considered in the briefs presented by other counsel in the case. The wisdom and propriety of the appropriations are matters in which the state, as distinguished from the city, is not particularly

concerned. The sole consideration of this brief is to attempt to sustain the power of appropriation, hence no attempt will here be made to discuss the merits of the individual cases nor will the facts be set forth, except as to such incidental comment as may be necessary in the course of the argument.

ARGUMENT.

This is the first opportunity that this court has had for passing upon the validity of excess condemnation of property in connection with the construction of a public improvement. It is not unusual, however, for judicial inquiry into the validity of a certain mode of procedure to lag behind the recognition of that mode by popular will and legislative enactment. The principle of excess condemnation may rightfully be said to be novel so far as any widespread recognition is concerned. That there are many historical instances in which the principle has been applied is revealed in the brief on behalf of the petitioner. Only in compartively recent years, however, has that principle become embedded in the fundamental law of a sovereign state.

Historical analysis of the development of the principle leads to the conclusion that those states, eight in number, which have incorporated provisions in their Constitution authorizing excess condemnation, were for the most part actuated so to do by reason of court decisions rendering invalid excess appropriation on the ground that certain provisions of the constitutions of the respective states had been violated. It is an interesting commentary upon the force of the public opinion favoring the exercise of this right that the people of these eight states were not to be frustrated but, feeling so keenly the necessity for the application of the principle in modern urban development, by express constitutional provisions removed the

obstacles in their path. It remains to be seen whether any provision of the Constitution of the United States stands in the way of the accomplishment of this purpose which is evidently so much desired.

The main attack upon the validity of the proceedings of these cases is based upon the fact that they are violative of the provisions of the Fourteenth Amendment of the Constitution in that the respondents are being deprived of their properties without due process of law. It must be conceded, of course, that the statutes providing the method of determining the value of property and the method of payment of compensation for property taken for public purpose afford due process. That question can no longer be regarded as open. It must further be conceded that the necessity of appropriation is a legislative and not a judicial question. The sole remaining question is whether the purpose is public and that, according to previous decisions of this court, is justiciable. It becomes necessary, accordingly, to examine these cases to determine whether the purpose actuating the legislative body of Cincinnati is public.

It is perhaps difficult for those residing in the city of Washington and enjoying the fruits of the inspired work of Major L'Enfant to appreciate the problems and difficulties confronting many of our American cities in their efforts to provide their inhabitants with a better place in which to live. The perhaps excusable lack of vision of the original incorporators, the avarice of real estate speculators, and like causes have occasioned hundreds of millions of dollars of public expenditures in recent years

to correct the errors of the past. There has arisen a civic consciousness of community needs in furtherance of the public welfare far beyond the most enlightened conception of fifty years ago or even twenty-five years ago.

Possibly the most urgent problem confronting American cities today is that of providing adequate thorough fares for the tremendous volume of traffic which must be handled. Streets which, before the advent of the automobile, were regarded as almost boulevards, are pitiably ineffective to cope with present day vehicular traffic. It is regrettable but true that, where the necessity most exists, the expense of making the improvement is the greatest. In congested areas demanding relief, property values are the highest and property is most fully and completely utilized. Substantial buildings, as a rule, are found flush with the street line and any widening of the thoroughfare means their practical destruction, although but a comparatively small percentage of the real estate be taken. Oftentimes the improvement contemplated leaves comparatively small irregular pieces of property if only so much property as is actually to be occupied by the improvement is taken. The small parcels are unfit for development or use appropriate to the type of the improvement made and their existence inevitably retards all development of adjacent private property and hence detracts from the usefulness of the improvement itself. Their intrinsic value is far exceeded by their nuisance value.

Realizing that an improvement of this character must fail in the accomplishment of its complete purpose if

provision could not be made for the proper development of adjacent property, those interested in proper civic development conceived the principle of excess condemnation which, while giving to private property owners full compensation for any interest taken, yet enabled the municipalities, by the acquisition of additional property, to so readjust property lines adjacent to the improvement as to insure its full and complete development in a way appropriate to the improvement made. It is thus to be seen that, at least as ordinarily applied, excess condemnation is used by those who are actuated solely by motives of a public character. As has heretofore been stated, the primary question for consideration by this court in connection with the application of the Fourteenth Amendment is whether or not the real purpose is public. Ordinarily this question may be answered by a determination of whether this purpose is private.

The court will scan in vain the record in these cases for any indication that the appropriations sought to be made are in reality in furtherance of a private, as distinguished from a public, purpose. It is not the taking of A's land for the sole purpose of turning it over to B. While, in the end, B may acquire A's property, A would be paid full value therefor and presumably B, likewise, would be compelled to pay its reasonable worth after the improvement is made, and the property itself will, if the avowed intention of the city be fulfilled, be transmuted by rearrangement of lot lines into an essentially different property than that originally owned by A. It is this readjustment of property lines, together with re-

strictions where appropriate, that constitutes the public purpose which is the justification for the taking in furtherance of the improvement. The real purpose in view is the accomplishment of a public improvement, and the acquisition of excess land and its subsequent disposition after rearrangement is but incidental to the accomplishment of the major result. If that result may only be attained by such means, then surely the land is taken "for public use", although that use entails the resale of the property in such form as best to further the major object.

Both lower courts give guarded recognition to the right of a municipality to acquire the remnant of a parcel which may be left where substantially all of a given parcel is taken, so that the cost of acquiring what is actually needed amounts to practically the entire value of the whole tract. Both courts, however, deny that in any one of these three cases the principle may be applied. It is respectfully submitted that in both the Richards and Reakirt cases the record is undisputed that the actual improvement will occupy a part of the tract taken. This being conceded, it must further be conceded that the decision of the lower courts was grounded upon the **necessity** of taking and it has been uniformly recognized by this court that the necessity is purely a legislative question and accordingly not justiciable. Manifestly, the lower courts erred in conceding the right to take remnants at all and then denying the necessity with respect to the particular remnants here involved.

The Vester case is of a different character. It is there proposed to take a lot which does not abut upon the im-

provement at all. The lots at that particular point front upon Broadway rather than Fifth street, which is the street being widened. The 25 feet necessary for the actual improvement leaves a very narrow lot fronting on Broadway, with a depth of 90 feet on Fifth street. It is proposed to take this narrow lot and also the two succeeding lots fronting upon Broadway with the obvious purpose in view of readjusting lot lines facing Fifth street.

The question here presented is, therefore, whether, in providing against the existence of unusable parcels of land immediately adjacent to the improvement, the city may appropriate property not abutting thereon and join parcels together so as to create appropriate sites for improvements in harmony with the character of the public improvement in view.

If the right of excess condemnation under the so-called remnant theory is not to be entirely emasculated, then clearly the right to take the property involved in the Vester case must exist. Of little benefit would it be to the city to acquire remnants unsuitable for use were it not also privileged to acquire additional property with which it may combine the remnants into usable tracts of ground for ultimate disposition. If this right be not accorded, then the only purpose served in permitting excess condemnation at all is that of economy. The District Court (Rec., p. 30) holds that where substantial improvements are destroyed and a substantial portion of the land taken so that the land and the value of the improvements would substantially equal the total value of the property, the city should have the right to take all. He also concedes

that, under those circumstances, the city may legitimately recoup itself by the sale of the remaining parcels. If, however, those parcels be not usable, then plainly there is an economic restriction upon the resale thereof, and, in practical effect, the only advantage gained is that of recoupment. The development of property along the improvement, which is an essential feature of the justification of excess condemnation, is not subserved. In order that the full public benefit of the condemnation of remnants may be had, it is absolutely essential that the city be entitled to take property in addition to those remnants which are left as the result of taking that property which is necessary for the actual construction of the improvement.

It is here argued, and so found by the Circuit Court of Appeals, that in each of these cases the sole object in the appropriation was to recoup to the city some cost of the improvement. It is submitted that the facts in these cases do not justify this conclusion. Assuming, however, that recoupment is the sole motive, does that fact necessarily render the proceedings invalid? It is respectfully submitted that it does not.

Condemnation of property must be for a public purpose. Recoupment obviously means getting back a certain portion of an expenditure already made. The expenditure in a case of this kind is that of public money and accordingly recoupment is a saving of public funds. So when public officials of a municipality acquire the property in question for the purpose of saving public money, manifestly it is done for a public purpose. Is it

not true that the **taking** of the property and not necessarily its ultimate use, must be for a public purpose? By its acquisition and subsequent resale, a vital public purpose has been served. It may be urged that mere economy does not constitute justification for taking private property. Economy in the administration of public affairs should surely not be discouraged and when that economy is effected by making full compensation to all owners of private property, it should be applauded.

The accomplishment of a street widening project in modern municipalities is a tremendously expensive affair. The inordinate cost incident to these improvements has long been a deterrent to their more rapid accomplishment. It is rare indeed that a street widening project is accomplished in which the general taxpayers are not required to bear at least fifty per cent of the expense. Consequently, the abutting property owner, who has the large benefit of the improvement, secures an increased value of his property, which is paid for from tax money. This increment in value inures to the benefit of the municipality, when land adjacent to the improvement is purchased and disposed of after the improvement is made. The original owner of the land is deprived of nothing except its speculative value incident to an improvement which is made at the expense of the taxpayers. He is paid the fair value of his property before the improvement is made. Whatever increment there is in the value is received by the taxpayers upon the subsequent sale of the property. To whom more appropriately should that increment go? A public improvement may be under-

taken which, if this method be not available, could not be attempted, and the provision of the means for making a needed public improvement certainly constitutes a public purpose.

In the light of the foregoing discussion of the reasons for the use of excess condemnation, more immediate consideration of the application of the 14th Amendment of the Constitution may be given.

The Constitution of the United States, as it is interpreted by this court, is a marvelous document. The wisdom of this court has given it a life and resiliency which, while steadfastly holding to the fundamental meaning, has enabled our fundamental law to meet the demands of a vastly different political, social and economic era than that in which it was drawn. This is particularly true of the due process clause. Practically every new principle of social and economic advancement must stand the test of the due process clause before the bar of this court.

In these cases there is being tested for the first time the validity of a principle which has been developed solely for the purpose of better accomplishing certain necessary public results. Before denying the right to use the methods here in question, this court will surely scrutinize with care the alleged constitutional rights of the respondents which are claimed here to be violated. Certainly where the people of eight sovereign states have proclaimed that this method should be adopted, this court should hesitate long before denying to these states the validity of their actions. The adoption of these constitutional amendments is a clear indication of an insistent

and growing public feeling that excess condemnation is both necessary and proper. In the minds of the overwhelming majority of the people of these sovereign states a public purpose will be served. That public purpose has arisen by reason of material changes in our urban life. That this court is fully conscious of the obligation to recognize these changes in the application of the due process clause is clearly revealed in the language of Mr. Justice Sutherland, in the case of Euclid v. Ambler Realty Co., 272 U. S., p. 365, where, on page 386, he says:

> "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.
>
> In a changing world, it is impossible that it should be otherwise."

The exigencies of modern urban life demand greater latitude in making private property subservient to the general good than has been true in the past. The present is a clear example where that necessity exists.

This court has ever been ready to recognize the needs created by our changing civilization and has placed its stamp of validity upon many measures enacted in furtherance of the public welfare, which one hundred years ago would have been regarded as arbitrary and unreasonable. There is no need to restate here the instances in which measures adopted under the police power have been sustained. Private rights are everywhere being justifiably invaded in the interest of the public. The case cited above is but typical of these instances. Another is that of Thomas Cusack Co. v. Chicago, 242 U. S., 526. In both instances, property rights were taken away without compensation, but this court found justification in the larger public necessity. Surely as liberal a rule should be applied to the exercise of the sovereign power of eminent domain, for in its exercise full compensation is given for all property taken.

We have the solemn declaration of the people of Ohio that excess condemnation is a taking for a public purpose. That declaration will not be lightly disregarded. If this court accords to the state the latitude which it permitted the federal government in the case of Old Dominion Land Company v. United States, 269 U. S., 55, but one conclusion may be reached.

In the case of Rindge Co. v. Los Angeles County, 262 U. S., p. 700, Mr. Justice Sanford states on page 705:

> "The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this court, while enforcing the Fourteenth Amendment shall keep in view the diversity of such conditions and regard with great respect the judgment of state courts on what shall be deemed public uses in any state."

If the decision of the courts of the state be entitled to respect, surely the considered judgment of the people themselves, evidenced by the adoption of a constitutional amendment, should be highly regarded.

DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the court below renders mere lip service to the right of excess condemnation. The concluding sentence of the opinion is:

> "We do not hold that the provision of the state Constitution might not be validly enforced in a proper case, but that as applied by the city in these cases it violates the due process clause of the Constitution."

An analysis of the conclusion of the court makes clear that (1) excess condemnation on the "remnant theory" is restricted to those instances where the court may say, as a matter of law, that (a) the remnant cannot be improved by the owner in a manner commensurate with the improvement, and (b) the jury would be justified in finding that the value of the entire tract is the proper measure

of damages; (2) the right to take additional property to join with remnants legitimately required is entirely denied; (3) the protective theory is not discussed; and (4) the recoupment theory is entirely denied. In such a crippled condition does this decision leave the provision of the Ohio Constitution that it would be scarcely recognized by those who fostered it.

Under the conclusion of the lower court, every instance in which excess condemnation is attempted raises a justiciable question and the courts must determine whether what is proposed to be taken "would be valuable and utilizable for purposes suitable to the location of the property" within the language of the court. (Rec., p. 106.) Nothing is left to the legislative arm. All right to effect economy in the expenditure of public funds by securing to the public the values which the public moneys have established is denied. It needs little foresight to see that the constitutional provision, thus hamstrung, will be of no practical value to Ohio municipalities.

CONCLUSION.

Constitutional provisions in seven states other than Ohio are indirectly here involved. These constitutional provisions have been adopted solely in furtherance of the public welfare. If the lower court's decision remains undisputed, the right of excess condemnation, to all intents and purposes, is denied. The cases here involved are but typical instances in which the principles of excess condemnation should be applied and it is accordingly

respectfully submitted that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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